

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

KARMEN J. ROUSE,	)	
	)	
Claimant,	)	<b>IC 00-010498</b>
	)	
v.	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
PARROTT MECHANICAL, INC.,	)	<b>AND RECOMMENDATION</b>
	)	
Employer,	)	Filed
	)	November 8, 2004
and	)	
	)	
LUMBERMAN'S MUTUAL	)	
CASUALTY COMPANY,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Coeur d'Alene (CDA) on June 2, 2004. Claimant was present in person and represented by attorney Michael J. Verbillis of CDA. Defendants were represented by attorney Eric S. Bailey of Boise. The parties presented oral and documentary evidence. This matter was continued for the taking of two post-hearing depositions, the submission of briefs, and subsequently came under advisement on September 7, 2004.

**ISSUES**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

The noticed issues to be resolved are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;
2. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;
3. Whether Claimant is entitled to temporary partial or temporary total disability (TPD/TTD) benefits, and the extent thereof;
4. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
5. Whether Claimant is entitled to attorney's fees due to Employer/Surety's unreasonable denial of compensation pursuant to Idaho Code § 72-804; and,
6. Whether the Commission should retain jurisdiction beyond the applicable Statute of Limitations.

### **ARGUMENTS OF THE PARTIES**

Claimant argues she is entitled to the continuing medical benefits necessary to treat her left knee and low back condition from the time her claim was closed by Surety in May 2003 until the present. She specifically seeks the costs associated with her May 2003 and August 2003 knee surgeries. She further argues she is entitled to time-loss benefits for seven weeks after each of her 2003 surgeries, representing her periods of recovery. Claimant also argues she is entitled to a 30% of the lower extremity (LE) PPI rating for her left knee after having been found medically stable in December 2000, and a 3% of the whole person for her low back condition; ratings given by Dr. Giesen, her treating physician. She further argues she is entitled to attorney's fees for

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

Defendants' egregious conduct in failing to pay for her May and August 2003 surgeries, the related time-loss benefits, and her two PPI ratings.

Defendants argue their denial of benefits for Claimant's 2003 surgeries was reasonable since the surgeries were neither necessary nor reasonably required by her physician, and that their denial was supported by reasonable and competent medical opinions. They further argue Claimant has never been medically stable relative to her left knee, and that as a consequence, they cannot be held liable for any claimed PPI benefits and related attorney's fees for failing to pay these benefits since the issue is not ripe. Defendants agree Claimant is entitled to the 3% of the whole person PPI rating for her low back condition given by Dr. Giesen, but argue she is not entitled to attorney's fees on the issue because the rating was initially disclosed at hearing. They further argue Claimant cannot claim any benefits for her 2001 right foot injury since she has already made a claim for that injury with her current employer. Defendants also argue it is inappropriate to address future medical care at this time since medical benefits causally connected to an industrial accident in reality have no statute of limitations and there is no specific recommendation for surgery at this time.

Claimant counters Defendants' arguments are based on a retrospective view of her condition and ignore the medical record. She further argues there are no medical opinions to indicate the care she received was unreasonable. Claimant suggests Defendants are arguing that any type of reparative and restorative surgery, when viewed retrospectively, can be later disavowed as unnecessary. She indicates this disingenuous approach marks a new low for an insurance company that did not take the appropriate steps as events unfolded. She seeks the costs associated with the two 2003 knee surgeries, seven weeks of time-loss benefits after each surgery, the December 2000 PPI rating for her left knee, the current PPI rating for her low back, and attorney's fees for

Defendants' cavalier attitude toward her.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, her spouse, Scott W. Rouse, and John T. Giesen, M.D., taken at the June 2, 2004, hearing;
2. Claimant's Exhibits C1 through C9 admitted at the hearing;
3. Defendants' Exhibits D1 through D11 admitted at the hearing. Exhibit D11 is the deposition of Claimant taken on February 19, 2004;
4. The deposition of Warren J. Adams, M.D., with Exhibits 1 through 4, taken by Defendants on June 2, 2004;
5. The deposition of Timothy Lovell, M.D., with Exhibit 1, taken by Claimant on June 28, 2004.

All objections made during the two post-hearing depositions are overruled.

After having carefully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant, a bookkeeper, began working for Employer in March 1997 in accounts receivable. On February 15, 2000, she slipped and fell at work, severely injuring her left knee. Claimant was taken by ambulance to Kootenai Medical Center (KMC) in CDA. X-rays showed a severely comminuted displaced fracture of the patella. Claimant was admitted and referred to John T. Giesen, M.D., an orthopedic surgeon; he became her treating physician.

2. The following day Dr. Giesen performed an open reduction with internal fixation in

an attempt to repair Claimant's left patella [the first surgery] at KMC. Due to the severity of the fracture, the repair failed prior to Claimant leaving the hospital.

3. On February 18, 2000, Dr. Giesen performed a partial patellectomy, a repair of the patellar tendon, and removed the pins and wires implanted during Claimant's first surgery [the second surgery].

4. During her recovery, Claimant underwent physical therapy at North Idaho Physical Therapy (NIPT) in Hayden. On her first visit, the therapist noted she had been experiencing low back spasms over the past few weeks.

5. On April 24, 2000, Dr. Giesen noted Claimant had been experiencing back pain since her fall. He ordered a MRI. It showed moderate degenerative disk disease at the L5-S1 level.

6. Dr. Giesen restricted Claimant from working from February 15, 2000, the date of her industrial accident, until he released her on June 5, 2000.

7. Claimant completed her physical therapy on August 4, 2000. The final report indicated she continued to have patella femoral pain and quadriceps weakness, and that her low back condition continued to bother her.

8. In a note to Surety signed on August 14, 2000, Dr. Giesen indicated Claimant would eventually need a total knee arthroplasty (TKA), and assigned a PPI rating of 30% for loss of leg at the hip. On September 12, 2000, Surety, through its administrator, GAB Robins, citing Dr. Giesen's opinion, began paying Claimant a 30% of the LE PPI rating.

9. Claimant returned to Dr. Giesen on September 27, 2000, complaining of continued left knee and low back pain. He opined she had clearly and severely aggravated a pre-existing problem in her back and that it would be a permanent problem, and that her knee would never be the

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5**

same due to the amount of patella that had to be excised. Dr. Giesen prescribed physical therapy for Claimant's back. It was conducted at NIPT between October 2, 2000, and December 1, 2000.

10. Claimant left Employer in October 2000, and shortly thereafter began working for Verizon Communications, Inc., at its DSL Center. Verizon provided its employees with group health care insurance through Blue Cross, *i.e.*, HMO Blue; and with a disability policy with another insurance company.

11. At Surety's request, Claimant was seen for an IME by Mark R. Leadbetter, M.D., and Ronald Vincent, M.D., on December 18, 2000, at Objective Medical Assessments Corporation in Spokane. Dr. Leadbetter, an orthopedic surgeon, and Dr. Vincent, a neurosurgeon, diagnosed (1) degenerative disk disease at L5-S1, pre-existing; (2) lumbar strain with chronic low back pain, related to the injury on a more probable than not basis, and representing an aggravation of a pre-existing condition; and (3) a fracture of the left patella requiring a subtotal patellectomy of the left knee, industrially related. They further opined Claimant was fixed and stable relative to her lumbar spine, and assigned her a Category 1, or zero PPI rating. Dr. Leadbetter and Dr. Vincent also opined Claimant was fixed and stable relative to her left knee and indicated the fairest estimate of a PPI rating was 17% of the LE for a displaced nonunion of the left patella. They further opined Claimant might require removal of the remaining portion of her left patella, and that if it did occur, it would be industrially related.

12. On January 3, 2001, Dr. Giesen noted Claimant had a significant disability, but also indicated he did not think there was anything more that could be done at that time.

13. In a letter to Surety dated January 22, 2001, Dr. Giesen indicated that he agreed with the IME Panel, but opined Claimant would need a TKA at some point in the future, and that she was

entitled to the 30% of the lower extremity PPI rating. He confirmed his PPI rating in a second letter dated February 26, 2001.

14. There is a seeming inconsistency between Dr. Giesen's agreement with the IME conclusions, and by association the PPI given by Dr. Leadbetter and Dr. Vincent, and the PPI rating he gave Claimant. He did, however, consistently restate on multiple occasions that he gave Claimant a 30% of the LE PPI for her left knee.

15. In a letter dated January 29, 2001, Surety informed Claimant that based on Dr. Giesen's agreement with the IME Panel, her PPI rating was being reduced to 17% of the LE. The letter also informed her that her future medical care was covered for life as long as it was related to her claim.

16. In an April 16, 2001, response to Surety, Dr. Giesen indicated he did not agree with the IME Panel PPI rating, and again opined Claimant had a PPI rating of 30% of the LE.

17. Dr. Leadbetter, in a letter to Surety dated April 23, 2001, opined there was no indication Claimant would require a TKA in the future as a consequence of her February 15, 2000, industrial accident, and that there was no indication of ongoing marked degenerative changes secondary to her industrial injury.

18. Surety closed Claimant's claim for compensation on May 2, 2001. Payment for the first and second surgeries, and corresponding medical care and related time-loss benefits were paid and are not at issue here.

19. Claimant saw Dr. Giesen on August 1, 2001, after injuring her right foot on July 1, 2001. The injury, which fractured two bones in her right foot, apparently occurred while she was at Verizon's facility. The medical records covering her initial care are not contained in the record.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 7**

The mechanism of injury is unclear, but Dr. Giesen indicated her bad knee may have caused her to trip. The foot injury was accepted by Verizon's workers' compensation carrier; medical and time-loss benefits, and an impairment rating were paid.

20. There are also chart notes which indicate Claimant suffered from Morton's interdigital neuroma in her right foot, that Dr. Giesen treated her for the condition, but that it was not work-related.

21. Claimant is not seeking any compensation from Surety for her right foot injury.

22. Claimant saw Dr. Giesen twice during October 2001 complaining of continuing pain in her left knee medial joint. On November 13, 2001, he performed an arthroscopic chondroplasty and removed a screw from Claimant's knee [the third surgery]. On November 21, 2001, Dr. Giesen told Claimant that if the third surgery did not markedly improve her pain, she should have a patellectomy.

23. In a note to Surety dated November 26, 2001, Dr. Giesen opined the problems Claimant was having with her left knee were directly caused by her patella fracture and the small size of the remaining bone.

24. As a consequence of the third surgery, Dr. Giesen restricted Claimant from working between November 13, 2001, and December 13, 2001.

25. At Surety's request, Claimant saw Warren J. Adams, M.D., on January 7, 2002, for another IME in Spokane. Dr. Adams, an orthopedic surgeon, tailored his opinions to respond to specific questions from Surety. He opined (1) Claimant had reached maximum medical stability as a result of her February 15, 2000, injury; (2) that there were no objective surgical indications relative to her left knee; (3) that Claimant could return to her job at Verizon; and (4) that, in accordance with



Table 17-33 of the AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, she was entitled to a PPI rating of 7% of the LE for a partial patellectomy, attributable wholly to the February 2000 incident.

26. Dr. Adams also indicated Claimant's past medical records had noted symptoms of low back pain, but that the notes did not relate the pain to the incident of February 15, 2000. He also indicated past medical records related a right foot injury, but questioned, based on Dr. Giesen's chart notes, how it was related to Claimant's left knee injury. Dr. Adams further opined Claimant's third knee surgery was reasonable.

27. Claimant saw Dr. Giesen several times in early 2002. It was decided not to excise the remaining portion of her left patella because her pain level was not getting worse. On March 4, 2002, Dr. Giesen opined Claimant was medically stable, but that she would need a TKA at some point after a patellectomy.

28. After Dr. Adams' IME, Surety found Claimant's third surgery compensable and paid medical and time-loss benefits. The surgical center bill, however, had been turned over to a collection agency prior to payment.

29. In a letter dated June 17, 2002, Surety offered to settle Claimant's claim for compensation for \$1,500.00. They stated, based on Dr. Giesen's 17% PPI rating, and Dr. Adams' 7% PPI rating, that there was an overpayment of 10% of the LE. Surety further stated Claimant was medically stable relative to her February 15, 2000, incident, that no further medical care was considered reasonable and necessary, and that there was no indication she was a further surgical candidate. Claimant declined the settlement offer.

30. In a second letter dated June 17, 2002, Surety asked Claimant to repay the asserted

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9**

PPI overpayment.

31. Dr. Giesen never gave Claimant a 17% of the LE PPI rating; Dr. Leadbetter and Dr. Vincent did.

32. With Surety's approval, Claimant returned to Dr. Giesen on March 4, 2003. X-rays showed her left patella was displaced laterally. Dr. Giesen prescribed physical therapy at NIPT. The therapy was stopped after it began aggravating her condition. Claimant and Dr. Giesen decided to proceed with a patellofemoral replacement.

33. The surgery was scheduled for May 9, 2003, at KMC. Surety, however, notified KMC two days prior to the scheduled surgery that Claimant's claim had been closed. The hospital notified Claimant. She decided to proceed with the surgery anyway. The procedure [the fourth surgery] was conducted as scheduled by Dr. Giesen. Physical Therapy at NIPT followed from June 2, 2003, until June 18, 2003. Less deductibles, the fourth surgery was paid for by Blue Cross; short-term disability by Verizon's disability carrier.

34. On May 20, 2003, Dr. Giesen opined Claimant's fourth surgery was necessitated by the severe industrial accident in which she badly fractured her patella.

35. In a May 31, 2003, letter to Claimant, Surety stated, that after reviewing Dr. Giesen's most recent medical records, they did not see anything new. Surety further stated Claimant apparently did not agree with their June 2002 denial and did not want to settle her claim, but now wanted to pursue knee surgery. They again denied her claim for compensation.

36. In June 2003 Claimant's care was assumed by Lloyd E. Witham, M.D., an orthopedic surgeon associated with Dr. Giesen; both practiced in the same clinic. Dr. Giesen was experiencing medical problems and was no longer actively practicing medicine. On June 17, 2003, Dr. Witham

noted Claimant was experiencing lateral subluxation and worsening range of motion of the left knee.

37. Claimant's left knee condition continued to deteriorate. Dr. Witham proposed an arthroscopic lateral patellar release as a first step in the treatment of what he characterized as a difficult problem, and that if the release was unsuccessful, a patellectomy.

38. The surgical release was performed on August 20, 2003, by Dr. Witham [the fifth surgery]. Physical therapy again followed at NIPT; the exact dates are unknown, but continued until at least mid-December 2003. The fifth surgery was again paid, less deductibles, by Blue Cross; short-term disability was again paid by Verizon's disability carrier.

39. Surety denied coverage for the fifth surgery on July 23, 2003, stating it did not appear related to the February 15, 2000, industrial accident.

40. Claimant retained counsel on August 1, 2003.

41. Dr. Witham's chart notes indicate Claimant continued to suffer left knee pain, and that she was going to see Timothy P. Lovell, M.D., a Spokane orthopedic surgeon, for a second opinion.

42. Claimant saw Dr. Lovell on February 25, 2004. He diagnosed a painful, loose, left knee patellofemoral replacement, and recommended a patellectomy. Dr. Lovell further opined the procedure was related to Claimant's original fall, that all of the procedures she had had so far had been indicated and appropriate, and that all were the result of her initial patella fracture.

43. In a March 4, 2004, chart note, Dr. Witham indicated Claimant had seen Dr. Lovell, that an x-ray showed the patellar component was completely dissociated from the small residual patella, and that Dr. Lovell would manage Claimant's left knee problem, including surgical intervention.

44. Claimant began seeing Eric Boughton, D.C., in CDA on March 15, 2004, for low back pain. The visits continued through at least April 26, 2004. The problem was apparently between L2 and L4. There is nothing in the handwritten chart notes to indicate the care was related to Claimant's February 15, 2000, industrial accident.

45. Dr. Lovell performed a patellectomy [the sixth surgery] on Claimant's left knee at Sacred Heart Medical Center in Spokane on May 4, 2004. Neither Claimant nor Dr. Lovell contacted Surety prior to the procedure. Based on her prior experiences with Surety, Claimant believed the procedure would have been denied. Less deductibles, the surgery was again paid for by Blue Cross; short-term disability was again paid by Verizon's disability carrier.

46. At hearing, Defendants agreed to pay the medical and time-loss benefits for the sixth surgery, and indicated benefits would have been paid if they had been aware of the procedure.

47. At hearing, Dr. Giesen opined, that since Claimant had had her patella removed, she would develop arthritis, and that she would need a TKA at some point in the future. He indicated, in retrospect, that he should have taken out Claimant's kneecap rather than pursuing conservative treatment and trying to salvage as much as possible. Dr. Giesen further opined Claimant's left knee was not medically stable. He explained his 30% of the LE PPI rating as 22% for a total patellectomy and 8% for pain, while factoring in Claimant's complaints, and utilizing his 30 plus years of clinical experience.

48. Dr. Giesen further opined it was reasonable for Claimant to have missed seven weeks of work after each of her 2003 surgeries, and that she had incurred a PPI rating of 3% of the whole person for the degenerative changes in her lumbar spine which had been lit up by walking on crutches after her knee injury.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 12**

49. At his post-hearing deposition, Dr. Adams opined Claimant was not medically stable relative to her patellectomy, and that it would be inappropriate to give her a PPI rating for her left knee until she was. He further opined a TKA in the very near future was not indicated since the medical records did not show any significant degenerative change, that a TKA post-patellectomy was a very uncommon procedure, that whether Claimant would need a TKA in the future was speculative, and that if she did have a TKA in the future, it would not be related to her February 2000 industrial accident. Dr. Adams also opined Claimant's patellar replacement surgery [the fourth surgery] was not related to her industrial accident, that the patellectomy would have been the preferred surgical procedure, in that a patellectomy is an accepted procedure for a condition that is associated with a deformed patella, and that if she had had a patellectomy in May 2003, the August 2003 surgery [the fifth surgery] would also have been unnecessary.

50. Dr. Adams further opined he had no reason to either agree or disagree with Dr. Giesen's 3% of the whole person PPI rating for Claimant's low back condition, and that Surety should be responsible for Claimant's patellectomy and the associated time-loss benefits.

51. Claimant returned to Dr. Lovell on June 16, 2004. He noted she was doing really well and that she already felt better than she did prior to the patellectomy. X-rays showed early degenerative changes in the medical and lateral compartments of Claimant's left knee.

52. At his post-hearing deposition, Dr. Lovell opined Claimant's medical treatment before he saw her was very appropriate under the circumstances, but that with the benefit of hindsight, an early patellectomy would have saved her a lot of problems. He further opined, that without the benefits of retrospect, he would have proceeded exactly as Dr. Giesen and Dr. Witham had. Dr. Lovell also opined removing a patella alters the knee mechanics and predisposes the joint

to arthritis. He stated he observed metalosis when he performed Claimant's patellectomy, that he cleaned out as many of the particles as possible, but that some remained, and that these particles would cause a reaction in the synovium, which in turn would cause arthritis. Dr. Lovell further opined the absence of a patella clearly disposes a knee to develop arthritis, and that Claimant would absolutely need a TKA, but that he could not predict when. He also opined Claimant's left knee was not medically stable.

53. Surety's conduct in this matter in dealing with Claimant's third and fourth surgeries has been unreasonable.

## **DISCUSSION**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto*

*Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor’s opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

Claimant argues she slipped and fell in a February 15, 2000, industrial accident, severely injuring her left knee, and that as a consequence of her injury, she aggravated her pre-existing degenerative back condition. Defendants have not argued otherwise. The testimony and medical records support Claimant. Thus, the Referee concludes Claimant fractured her left patella in a February 15, 2000, industrial accident, and that as a consequence of her industrial injury, aggravated her pre-existing degenerative back condition.

2. **Medical Benefits.** The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432 (1), medical treatment is reasonable if the employee’s physician requires the

treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

While acknowledging Claimant's industrial accident and injuries, and paying medical benefits for her first, second, and third surgeries along with her low back condition, and agreeing to pay benefits for her sixth surgery, Defendants contest whether Claimant's fourth and fifth surgeries were reasonable and necessary. They maintain the only real issue in this matter is whether they pay benefits for these two surgeries. Claimant argues the two surgeries were both reasonable and required by her treating physicians. She cites the opinions of Dr. Giesen, Dr. Witham, and Dr. Lovell, who performed the six surgical procedures on Claimant's left knee.

Defendants assert, that based on the 2000 IME opinion of Dr. Leadbetter and Dr. Vincent, they would have paid for a patellectomy, thereby making it unnecessary for Claimant to have undergone the fourth and fifth procedures in 2003. Dr. Leadbetter and Dr. Vincent, however, opined Claimant's left knee was fixed and stable, and that she might need to have the remainder of her patella removed at some point. Dr. Adams, who performed the 2002 IME, also opined Claimant's left knee was fixed and stable, and that there were no objective surgical indications for her left knee. These pre-surgical opinions do not support Defendants' assertion that they would have paid for the patellectomy. Conversely, Dr. Giesen, Dr. Witham, and Dr. Lovell, Claimant's treating physicians, opined the fourth and fifth procedures were appropriate and reasonable. Dr. Giesen and Dr. Lovell did acknowledge, that in retrospectively viewing Claimant's progress, performing the patellectomy earlier would have been the better course. These physicians, however, did not have the benefit of hindsight when they made their decisions. The Referee finds the opinions of Dr. Giesen, Dr. Witham, and Dr. Lovell persuasive in this matter. Thus, the Referee concludes Claimant is



entitled to the medical care and treatment provided by Dr. Giesen for the fourth surgery in May 2003, by Dr. Witham for the fifth surgery in August 2003, and by Dr. Lovell for the sixth surgery in May 2004. This includes the prescribed physical therapy following each of the surgical procedures.

3. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C. P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

Claimant argues she was in a period of recovery for seven weeks after her fourth surgery and

after her fifth surgery. Defendants argue that since the two surgeries were not necessary, they should not be responsible for any associated time-loss benefits. Having previously concluded Claimant is entitled to the medical care associated with her fourth and fifth surgeries, the Referee further concludes Claimant is entitled to temporary total disability (TTD) benefits during the seven week period of recovery following her May 2003 surgery and during the seven week period of recovery following her August 2003 surgery. Defendants have agreed to pay time-loss benefits to Claimant during the period of recovery associated with her sixth surgery. Thus, the Referee also concludes Claimant is entitled to temporary total disability (TTD) benefits during the period of recovery following the May 2004 surgery.

4.     **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Claimant seeks two PPI ratings here. One for her left knee and one for her low back. Defendants agree Claimant is entitled to the 3% of the whole person PPI rating awarded her for her back by Dr. Giesen at hearing. Conversely, Dr. Adams, Dr. Giesen, and Dr. Lovell all opine

Claimant's left knee is not medically stable. There are no opinions to the contrary. Without medical stability, there can be no impairment rating. While Defendants have paid some impairment benefits for Claimant's left knee, a final rating cannot be given until she reaches medical stability. Thus, the Referee concludes Claimant is only entitled at this time to the permanent partial impairment (PPI) rating of 3% of the whole person for her low back condition. Jurisdiction is retained over the issue of a left knee PPI rating.

5. **Attorney's Fees.** Idaho Code § 72-804 provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

Claimant seeks attorney's fees for Defendants' failure to compensate her for the medical care and time-loss benefits associated with her fourth and fifth surgeries, and for failing to pay the PPI ratings given her by Dr. Giesen. The PPI ratings have been addressed above. Defendants agreed to pay her low back PPI after becoming aware of Dr. Giesen's rating at hearing. This is not

unreasonable. Since Claimant's left knee is not medically stable, a PPI rating for her knee is not appropriate at this time. While the rationale behind Defendants' choice of the lowest PPI rating in 2002 may be questionable, so was Dr. Giesen's higher rating since it looked to the future.

Defendants' conduct in denying Claimant medical and time-loss benefits for her fourth and fifth surgeries, however, has been unreasonable. Not even a retrospective view of this matter excuses their actions. There was absolutely no current medical opinion available upon which to base a denial in May of 2003. Rather there was a cavalier comment indicating nothing had changed in Dr. Giesen's chart notes to warrant any further care. This comment neither reflects Dr. Giesen's chart notes nor his opinions on Claimant's condition. Thus, the Referee concludes Claimant is entitled to attorney's fees as provided for by Idaho Code § 72-804 for Defendants' unreasonable refusal to pay medical and temporary total disability (TTD) benefits for her May 2003 and August 2003 left knee surgeries.

6. **Retention.** Claimant asks that the Commission retain jurisdiction of this matter. Since Claimant is not medically stable, the issue of impairment has not been fully addressed, and questions have been raised by Defendants about the compensability of any TKA, the Referee concludes it is appropriate for the Commission to retain jurisdiction of this matter.

### **CONCLUSIONS OF LAW**

1. Claimant fractured the patella in her left knee in a February 15, 2000, industrial accident, and that as a consequence of her industrial injury, aggravated her pre-existing degenerative back condition.

2. Claimant is entitled to the medical care and treatment provided by Dr. Giesen for the fourth surgery in May 2003, by Dr. Witham for the fifth surgery in August 2003, and by Dr. Lovell

for the sixth surgery in May 2004. This includes the prescribed physical therapy following each of the surgical procedures.

3. Claimant is entitled to temporary total disability (TTD) benefits during the seven week period of recovery following her May 2003 surgery and during the seven week period of recovery following her August 2003 surgery. Claimant is also entitled to temporary total disability (TTD) benefits during the period of recovery following her May 2004 surgery.

4. Claimant is only entitled at this time to a permanent partial impairment (PPI) rating of 3% of the whole person for her low back condition. Jurisdiction is retained over the issue of a left knee PPI rating.

5. Claimant is entitled to attorney's fees as provided for by Idaho Code § 72-804 for Defendants' unreasonable refusal to pay medical and temporary total disability (TTD) benefits for her May 2003 and August 2003 left knee surgeries.

6. The Commission retains jurisdiction over this matter.

### **RECOMMENDATION**

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 28th day of October, 2004.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of November, 2004, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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/s/